

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Forty-one Late-Filed Applications)
For Renewal of Educational Broadband Service)
Stations)
)

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 2007

Released: January 25, 2007

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us forty-one late-filed applications¹ to renew Educational Broadband Service (EBS) Stations with associated requests to waive Section 1.949(a) of the Commission's Rules to permit the untimely filing of the renewal applications.² For the reasons discussed below, we grant the waiver requests and direct processing of the associated renewal applications.

II. BACKGROUND

2. Over the past three years, the Commission has sought to promote the delivery of wireless broadband and educational services through its reevaluation of the rules and policies governing the Instructional Television Fixed Service (ITFS), the Multipoint Distribution Service, and Multichannel Multipoint Distribution Service (MMDS) in the 2500-2690 MHz band.³ In particular, the Commission

¹ A chart listing the pending late-filed ITFS renewal applications with waiver requests is attached as an appendix to this *Order*. In addition, the following licensees have pending applications for extension of time to construct: Board of Cooperative Service Sole Supervisory District (File No. 0002576223), Bowling Green (F) Wireless Cable Partnership (File Nos. 0002330262 and 0002330263), Bowling Green School (File No. 20020829AAF), Connecticut Public Broadcasting, Inc. (File No. 20020726AAH), Heartland Community College (File No. 0002619618), and Wrens Middle School (File No. 20020605AAI). In light of our action here today, we grant any necessary waivers of 47 C.F.R. § 1.946 and authorize the licensing staff of the Broadband Division of the Wireless Telecommunications Bureau to process those extension applications concurrently with the associated renewal applications. In addition, we note that on January 14, 2006, Heartland Community College filed a petition for reconsideration seeking reinstatement of a prior-filed extension application (File No. 20021003AAR). In light of our action authorizing processing of the later-filed extension application, we will dismiss that petition for reconsideration as moot. We also dismiss as moot a petition for reconsideration filed by the School Board of Miami Dade County (Miami Dade) on September 7, 2006. Miami Dade seeks reconsideration of the treatment of its previously filed renewal application for EBS Station KTB85 if it is determined that the instant renewal application it filed on September 7, 2006 cannot be accepted. Petition for Reconsideration, School Board of Miami Dade County (filed Sep. 7, 2006) at 2-3. Because we are granting Miami Dade a waiver to allow consideration of its pending renewal application, we dismiss its petition as moot.

² 47 C.F.R. § 1.949(a).

³ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to (continued....)

restructured the band plan for 2500-2690 MHz in order to address spectral inefficiencies due to the historical interleaving of channel blocks used by commercial operators and by educational licensees.⁴ Specifically, the new band plan created by the Commission consists of two low-power segments – the Lower Band Segment (LBS) and the Upper Band Segment (UBS) – and a high-power segment, the Middle Band Segment (MBS).⁵ In addition, the Commission established procedures for proponents to transition licensees to the new band plan, and changed the names of the MDS and ITFS services to the Broadband Radio Service (BRS) and EBS respectively.⁶ Under the Commission's rules, proponents were permitted to begin the transition process on January 10, 2005, the date that the rules adopted in the *BRS/EBS R&O* became effective.⁷

3. On or after January 10, 2005, forty-one EBS licensees submitted late-filed renewal applications and associated requests for waiver of Section 1.949(a) of the Commission's Rules, which requires that applications for renewal be filed no later than the license expiration date.⁸ In many instances, the EBS licensees indicate that they had relied on their lessees to timely file their renewal applications and that their lessees failed to do so.⁹

(...continued from previous page)

Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 03-66, 03-67, 02-68, MM Docket No. 97-217, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003) (*BRS/EBS NPRM*). See also Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O* and *FNPRM* as appropriate); Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd. 5606 (2006) (*BRS/EBS 3rd MO&O*).

⁴ *BRS/EBS R&O* at 14183 ¶ 37. Prior to this restructuring, the 2500-2690 MHz band consisted of interleaved channel blocks, with channel groups A-D and G allocated to the ITFS service and channel groups E, F, and H allocated to the MMDS service. See *BRS/EBS NPRM* at 6744 ¶ 47. In the ITFS and MMDS services, channels were usually licensed in groups of four. When ITFS was created, ITFS reception equipment could not receive adjacent channels without interference. Thus, the Commission interleaved channels in the following paired groups: the A block channels with the B block channels; the C block channels with the D block channels; the E block channels with the F block channels; and the G block channels with the H block channels. *Id.*

⁵ *BRS/EBS R&O*, 19 FCC Rcd at 14180-14188 ¶¶ 30-49. Under the new band plan, licensees in the EBS and BRS with four channels will receive 16.5 megahertz of contiguous spectrum in the LBS or UBS and a six megahertz channel in the MBS.

⁶ *Id.*, 19 FCC Rcd at 14169, 14197-141207 ¶¶ 6, 72-102. See also *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5639-5687 ¶¶ 59-180. BRS is a commercial service. EBS is an educational service that has generally been used for the transmission of instructional material to accredited educational institutions and non-educational institutions such as hospitals, nursing homes, training centers, and rehabilitation centers.

⁷ 69 Fed. Reg. 72020 (Dec. 10, 2004).

⁸ 47 C.F.R. § 1.949(a).

⁹ See, e.g., Application of Charlton County High, File No. 0002390634, Waiver Request (filed Nov. 25, 2005); Application of Haskell Community College, File No. 0002398240, Waiver Request (filed Dec. 2, 2005).

III. DISCUSSION

4. Under the Commission's policy regarding treatment of late-filed renewal applications in the Wireless Radio Services, renewal applications that are filed up to thirty days after the expiration date of the license will be granted *nunc pro tunc*¹⁰ if the application is otherwise sufficient under our rules. In those cases, the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.¹¹ Applicants who file renewal applications more than thirty days after the license expiration date also may request that the license be renewed *nunc pro tunc*. Such requests will be subject to stricter review, will not be routinely granted, and may be accompanied by enforcement action, including more significant fines or forfeitures.¹²

5. In determining whether to grant a late-filed application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.¹³ We may grant a request for a waiver when: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹⁴

6. As an initial matter, we reject the argument made by many of the EBS licensees seeking waiver of Section 1.949(a) that their late-filed renewal applications should be excused by their reliance on lessees to file these applications. The Commission has repeatedly held that each licensee is solely responsible for knowing the term of its license and submitting a renewal application in a timely manner.¹⁵ Furthermore, in 2004, the Bureau put EBS licensees on notice that they would be subject to the same renewal and waiver policies as other wireless licensees.¹⁶ Accordingly, we find that the EBS licensees' reliance on lessees to file their renewal applications does not justify a waiver to excuse their late filing.

7. Notwithstanding this conclusion, we find that strict application of Section 1.949(a) of the Commission's Rules would be inequitable, unduly burdensome, and contrary to the public interest

¹⁰ *Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done.

¹¹ See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11486 ¶ 22 (1999) (*ULS MO&O*).

¹² See *id.*, 14 FCC Rcd. at 11486 ¶ 22.

¹³ See *id.*, 14 FCC Rcd at 11485 ¶ 22.

¹⁴ 47 C.F.R. § 1.925(b)(3).

¹⁵ See Daniel Goodman, Receiver, Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission's Rules, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21944, 21972-21973 ¶ 53 (1998) (holding that "[i]t is the responsibility of each licensee to apply for renewal of its license prior to the expiration date of the license," and that "failure of a licensee to receive a [renewal form] from the Commission is no excuse for failure to file a renewal application")

¹⁶ See Eastern New Mexico University, *Memorandum Opinion and Order and Order on Reconsideration*, 19 FCC Rcd 19540, 19545 ¶ 11 (WTB 2004).

because denying these waiver requests could hinder the substantial efforts to transition the 2500-2690 MHz band. As noted above, the Commission is seeking to promote the delivery of wireless broadband and educational services through a major restructuring of the 2500-2690 MHz band, arguably the most significant change to the band plan since ITFS was first established in 1963. Through the *BRS/EBS R&O* and *BRS/EBS 3rd MO&O*, the Commission has established a process for transitioning to the new band plan that will require an extraordinary degree of coordination and negotiation among all affected licensees in the transition area over a finite time period.¹⁷ Though the rules for this process were established over a several year period, the transition of the 2500-2690 MHz band only recently began on July 19, 2006, when Clearwire and Sprint Nextel filed Initiation Plans to transition ten BTAs.¹⁸ Given the inchoate nature of the band transition, and the challenges inherent in a multi-party, time-limited process, the Commission has sought to minimize burdens on the transition proponents and other affected parties in order to spur transformation of the band.¹⁹ Consistent with these Commission policies, we believe that granting the waiver requests at issue and renewing the associated licenses will create greater certainty for existing and future transition proponents regarding which EBS licenses will be part of the transition, and thus facilitate a more rapid restructuring of the band.

8. Furthermore, if we were to deny the waiver requests at issue and the associated renewal applications, the spectrum covered by the affected licenses would lie fallow until the Commission reauctions the spectrum. Because the Commission recently concluded “that it is premature to make

¹⁷ This process requires a proponent, which can be a BRS or EBS licensee or lessee, to relocate licensees from their current interleaved channel locations to their new channel locations in the new band plan, according to the following three-stage process: the 30-month Initiation Phase, the 90-day Transition Planning Phase, and the 18-month Transition Completion Phase. *BRS/EBS R&O*, 19 FCC Rcd at 14194-14207 ¶¶ 68-102; *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5639-5686 ¶¶ 59-178. During the transition process, the proponent must contact and negotiate with every licensee in the Basic Trading Area (BTA) being transitioned. For instance, during the Initiation Phase, a proponent must send the Pre-Transition Data Request and transition notice to all BRS and EBS licensees in the BTA and file the Initiation Plan with the Commission. *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5654-5659 ¶¶ 96-106. During the 90-day Transition Planning Phase, the proponent must develop the Transition Plan and negotiate with all of the BRS and EBS licensees. *Id.*, 21 FCC Rcd at 5659-5667 ¶¶ 107-126. During the Transition Completion Phase, the proponent must replace downconverters at all eligible EBS receive sites, migrate eligible video and data transmission program tracks to the MBS, and file the Post-Transition Notification with the Commission. *Id.*, 21 FCC Rcd at 5674-5677 ¶¶ 144-152. After the transition is completed, the proponent must seek reimbursement for the costs of the transition. *Id.*, 21 FCC Rcd at 5677-5684 ¶¶ 153-172. In many instances, the proponent will have to arrange channel swaps with various BRS and EBS licensees to effectuate a particular business plan or to permit channel pairing, which makes the transition process even more difficult. *Id.*, 21 FCC Rcd at 5665 ¶¶ 120-122.

¹⁸ On July 19, 2006, Sprint Nextel filed Initiation Plans in the following BTAs: BTA 461 (Washington, DC) and BTA 029 (Baltimore, MD). Also on July 19, 2006, Clearwire filed Initiation Plans through Fixed Wireless Holdings LLC for the following BTAs: BTA 100 (Cumberland, MD); BTA 207 (Ironwood, MI); BTA 282 (Marquette, MI); BTA 295 (Middlesboro-Harlan, KY); BTA 330 (Olean, NY-Bradford, PA); BTA 360 (Pottsville, PA); BTA 382 (Rocky Mount-Wilson, NC); and BTA 475 (Williamsport, PA). See WT Docket No. 06-136.

¹⁹ For example, in the *BRS/EBS 3rd MO&O*, the Commission reduced the size of the area to be transitioned from Major Economic Area to BTA. *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5641-5642 ¶¶ 64-65. The Commission also required Multichannel Video Programming Distributors (MVPD) to inform proponents, in the Initiation Phase of the transition, that they intended to opt-out of the transition. *Id.*, 21 FCC Rcd at 5646 ¶ 74. In addition, the Commission adopted a “first-in-time” rule that assures a BRS or EBS licensee or lessee that it will be the proponent if it is the first to file an Initiation Plan for a BTA. *Id.*, 21 FCC Rcd at 5652-5654 ¶¶ 91-95. Also, the Commission reduced the requirements for filing the Initiation Plan and the Post-transition Notification. *Id.*, 21 FCC Rcd at 5658, 5677 ¶¶ 106, 152. Moreover, The Commission adopted two more safe harbors to assure proponents that a Transition Plan is reasonable if it offers certain safe harbors to EBS licensees. *Id.*, 21 FCC Rcd at 5661-5664 ¶¶ 112, 119.

available unassigned spectrum until the transition period is completed,”²⁰ it could be years before reclaimed spectrum is relicensed. The unavailability of such spectrum may discourage operators from providing service to markets and may discourage potential proponents from transitioning those markets. We find that such a result would be inconsistent with the Commission’s decisions in the *BRS/EBS* proceeding to promote a rapid transition to efficient use of the 2500-2690 MHz band.²¹

9. Accordingly, we find that it is in the public interest to grant the forty-one waiver requests at issue to ensure that potential proponents will transition the band to a more efficient structure, which we believe will lead to the deployment of new and innovative wireless services for the benefit of all Americans.²²

IV. CONCLUSION AND ORDERING CLAUSES

10. For the reasons discussed above, we grant the forty-one requests for waiver of Section 1.949(a) of the Commission’s Rules. We also direct processing of the associated renewal applications.

11. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.949(a) of the Commission’s Rules, 47 C.F.R. § 1.949(a), the Waivers of Section 1.949(a) of the Commission’s Rules filed in connection with the applications listed in Appendix A of this *Order* ARE GRANTED.

12. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309, and Section 1.949(a) of the Commission’s Rules, 47 C.F.R. § 1.949(a), that the Broadband Division SHALL PROCESS the applications listed in the attached appendix in accordance with this *Order* and the Commission’s rules and policies.

13. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309, and Section 1.946 of the Commission’s Rules, 47 C.F.R. § 1.946, that the Broadband Division SHALL PROCESS the extension applications filed by Board of Cooperative Service Sole Supervisory District (File No. 0002576223); Bowling Green (F) Wireless Cable Partnership (File Nos. 0002330262 and 0002330263); Bowling Green School (File No. 20020829AAF); Connecticut Public Broadcasting, Inc. (File No. 20020726AAH); Heartland Community College (File No. 0002619618); and Wrens Middle School (File No. 20020605AAI) in accordance with this *Order* and the Commission’s rules and policies.

²⁰ *Id.*, 21 FCC Rcd at 5739 ¶ 320. We note that NextWave Broadband, Inc. has filed a petition for reconsideration of that determination. Petition for Reconsideration, WT Docket No. 03-66, NextWave Broadband, Inc. (filed Jul. 19, 2006).

²¹ We note that no petition to deny or other objection was filed against these applications. We will closely scrutinize future late-filed waiver requests as the transition progresses, and we reserve the right to deny waiver requests if we conclude that granting such requests will not advance the transition (in the absence of other justifications for a waiver). Furthermore, if timely petitions are filed with a specific showing that grant of a waiver would hinder the transition of a particular market, we reserve the right to deny that waiver request and cancel the associated license.

²² The grant of these waiver requests does not mean that the licensee is entitled to be transitioned to the new band plan at the proponent’s expense. An EBS receive site is eligible to be replaced only if, *inter alia*, the receiver was installed at that site on or before the date the EBS licensee receives its Pre-Transition Data Request. 47 C.F.R. § 27.1233(a)(1)(i). Furthermore, only those programming tracks that were “being transmitted on December 31, 2002 or within six months prior thereto” are eligible for being migrated to the MBS at the proponent’s expense. 47 C.F.R. § 27.1233(b)(1)(ii).

14. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.106 and 1.946 of the Commission's Rules, 47 C.F.R. § 1.946, that the petitions for reconsideration filed by Heartland Community College on January 14, 2006 and by School Board of Miami Dade County on September 7, 2006 ARE DISMISSED AS MOOT.

15. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Joel D. Taubenblatt
Chief, Broadband Division
Wireless Telecommunications Bureau

APPENDIX A – LATE-FILED EBS RENEWAL APPLICATIONS

File Number	Licensee Name	Call Sign	Receipt Date	Expiration Date
0002525897	Albion Community Development Corporation, Inc.	WLX583	3/15/2006	7/2/2002
0002661076	Bellville Independent School District	WLX591	6/23/2006	7/13/2002
0002798102	Belt Public Schools	WNC777	10/26/2006	5/30/2006
0002405095	Board of Cooperative Educational Services Sole Supervisory District	WNC699	12/9/2005	7/17/2005
0002191529	Bowling Green (F) Wireless Cable Partnership	WMX650	6/6/2005	5/1/2001
0002191534	Bowling Green (F) Wireless Cable Partnership	WMX675	6/6/2005	5/1/2001
0002040428	Bowling Green School	WLX656	2/7/2005	9/16/2002
0002752589	Burke Co Middle School	WNC452	9/15/2006	10/13/2004
0002772351	Calhoun County Board of Education	WNC669	10/3/2006	5/25/2005
0002390634	Charlton County High	WLX680	11/25/2005	9/30/2002
0002743204	Chattanooga State Tech. Comm. College	WHR684	9/7/2006	3/11/1999
0002401076	Christus St. Michael Health System	WNC510	12/6/2005	12/8/2004
0002348398	City University	WNC422	10/14/2005	10/13/2004
0002649451	College of the Redwoods	WNC737	6/13/2006	5/2/2006
0002029671	Connecticut Public Broadcasting, Inc.	WHR804	1/31/2005	2/19/1997
0002409152	Danbury Independent School District	WLX751	12/14/2005	11/19/2002
0002371426	Eudora Unified School District #491	WLX327	11/4/2005	8/23/2001
0002132509	Franklin County Board of Education	WNC563	4/21/2005	3/21/2005
0002752204	Freed-Hardeman University	WLX819	9/14/2006	3/25/2003
0002398240	Haskell Community College	WNC697	12/2/2005	7/14/2005
0002392799	Heartland Community College	WLX983	11/29/2005	10/27/2003
0002033797	Herrington U.S.D. #487	WNC323	1/10/2005	6/21/2004
0002752193	Lambuth University	WLX818	9/14/2006	3/25/2003
0002840558	Linden City Board of Education	WNC329	12/7/2006	6/29/2004
0002498505	Marais Des Cygnes Valley US Dist. 456	WLX331	2/23/2006	8/22/2001
0002543875	New Mexico Tech	WNC413	3/24/2006	9/21/2004
0002708426	N. American Cath Ed'l Progr FD Inc	WLX992	8/9/2006	11/15/2003
0002303150	Northwestern State University of Louisiana	WNC626	9/7/2005	7/15/2005
0002224027	Ouachita Academy of Arts and	WNC534	7/1/2005	11/28/2004

	Science			
0002360151	Pearsall Independent School District	WNC382	10/27/2005	8/3/2004
0002390659	Putnam County School District	WLX443	11/25/2005	2/28/2002
0002390660	Putnam County School District	WLX242	11/25/2005	3/22/2000
0002672561	Santa Fe Community College	WNC636	7/6/2006	5/25/2005
0002837842	Sumter County Board of Education	WNC332	12/4/2006	6/29/2004
0002290900	St. Vincent Health Care	WHR682	8/25/2005	6/20/2005
0002402289	Silver Lake Unified School District #372	WLX904	12/7/2005	6/14/2003
0002397772	Texarkana College	WNC590	12/1/2005	4/20/2005
0002733724	The College of Santa Fe	WNC687	9/1/2006	7/31/2005
0002742547	The School Board of Miami-Dade County Florida	KTB85	9/7/2006	5/3/2005
0002260812	Unified School District #410	WNC334	8/2/2005	6/27/2004
0002091389	Wrens Middle School	WLX862	3/18/2005	5/7/2003